invariably considering that mere knowledge that a risk exsist creates an irrefutable reason for cessation of the labor exposing the injured party to such risk, failure to stop being deemed as sufficing in law to constitute contributory negligence and barring a recovery. As a matter of fact the reasonably prudent man does not consider the taking of some additional risks and chances at times for any number of different reasons as carelessness, but rather on the contrary considers that various other ends for example as the retention of his employment as an important a part of his duty of self-preservation as that of reducing to a minimum the necessary risks of life. Conduct that was more prudent than this would not in fact be that of the reasonably careful man but rather that of the excessively cautious man.

G. B.

BILLS OF PEACE IN TORT CASES.—The doctrine that equity will interfere to prevent a multiplicity of actions rests fundamentally upon the inadequacy of the legal remedy. The prevention of such multiplicity is a persuasive, but not a conclusive argument in favor of the jurisdiction. "The single fact that a multiplicity of suits may be prevented by the assumption of jurisdction by equity is not enough in all cases to sustain it."[1] In cases where one person is forced to sue many, or numerous persons are forced to sue one, equity jurisdiction was originally exercised only where there was a certain privity, common right, or community of interest in the subject matter between the numerous parties, such as disputes between the lord of the manor and his tenants over the customs of the manor,[2] or between a parson and his parishtoners over tithes.[3] Such were the original bills of peace. Under the natural expansion of equity, bills in the nature of bills of peace were granted to prevent a multiplicity of suits in varied classes of cases, in which there was strictly speaking no privity or common right between the numerous parties, and where there was often little more than a community of interest in the law and facts involved. Bills in the nature of bills of peace were allowed to establish a sole fishery right against many claimants;[4] to declare valid or invalid certificates held by some 1500 claimants for injuries occasioned by the bursting of a dam;[5] to invalidate false stock certificates fraudulently issued;[6] to enjoin a nuisance affecting many property holders;[7] to enjoin a continuing wrongful act injuring the property rights of many;[8] to enjoin suits against numerous insurance

[1] Hale v. Allinson, 188 U. S. 56 (1903).
[2] How v. Tenants of Bromsgrove, 1 Vernon 22 (Eng. 1681).
[3] Brown v. Vermuden, 1 Ch. Ca. 282 (Eng. 1676).
[4] Mayor of York v. Pilkington, 1 Atkyns 282 (Eng. 1737).
[5] Sheffield Water Works v. Yoemans, L. R. 2 Ch. 8 (Eng. 1866).
[6] N. Y., N. H. & H. R. R. Co. v. Schuyler, 17 N. Y. 592 (1858).
[7] Cadigan v. Brown, 120 Mass. 493 (1875).
[8] Ill. Cent. Ry. Co. v. Garrison, 81 Miss. 257, 32 So. 996 (1902); Ballou v. Inhabitants of Hopkinton, 4 Gray 324 (Mass. 1855).

companies when the policies were procured by the same fraud;[9] to enjoin illegal tax proceedings.[10]

The late Professor Pomeroy in his widely accepted work laid down the rule that equity may and should exercise jurisdiction, not only where there is a common right or a community of interest in the subject matter, but also where there is "merely a community of interest in questions of law and fact involved in the controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body."[11] This rule has been quoted and followed in many cases.[12] It has been, however, vigorously attacked, especially in cases of tort actions, and particularly in a well known Mississippi case,[13] which argued that Professor Pomeroy's rule was not justified by an analysis of his authorities, a perusal of which would show that, if there was not a community of interest in the subject matter, each of the numerous parties already had an equitable right and the problem was merely one of joinder of parties in equity; furthermore that bills of peace were never intended to join separate tort actions and that to do so would amount practically to a deprivation of the right to a jury trial. This case has also been widely followed.[14]

The fundamental reason for equity's taking jurisdiction in these cases is the inadequacy of the legal remedy. It must, therefore, be shown that the matter is more easily settled in equity,[15] and that the issues are simplified, not confused, as Professor Pomeroy states in a section inserted in his work after the Tribette decision.[16] It must also be shown that there will be an actual convenience to all parties and that the material interests of none will be overlooked or obstructed.[17] In negligence cases even though the injuries arise out of the same act, if the negligence of the tort-feasor is established, the amount of damages in each case is still a matter which the injured parties have a right to set before a jury. If a court of equity were to refer this matter to a common law jury, the latter would have before it a great mass of facts as to many separate injuries. Under these circumstances the individual issues would be

[9] Virginia-Carolina Chemical Co. v. Home Ins. Co., 113 Fed. 1 (1902).

[10] Cummings v. Merchant's National Bank, 101 U. S. 153 (1879).

[11] Pomeroy's Equity Jurisdiction I, §269.

[12] Carlton v. Newman, 77 Me. 408, 1 Atl. 194 (1885); Breimeyer v. Star Bottling Co., 136 Mo. App. 84, 117 S. W. 119 (1908); Town of Fairfield v. Southport National Bank, 77 Conn. 423, 59 Atl. 513 (1904).

[13] Tribette v. Ill. Central Ry. Co., 70 Miss. 182, 12 So. 32 (1892).

[14] Cumberland Tel. & Tel. v. Williamson, 101 Miss. 1, 57 So. 559 (1912); Madison v. Ducktown, etc., Iron Co., 113 Tenn. 331, 83 S. W. 658 (1904); Turner v. City of Mobile, 135 Ala. 73, 33 So. 132 (1902); Southern Steel Co. v. Hopkins, 157 Ala. 175, 47 So. 274 (1908); reversed, 174 Ala. 465, 57 So. 11 (1911); Hamilton v. Alabama Power Co., 195 Ala. 438, 70 So. 737 (1915); Vandalia Coal Co. v. Lawson, 43 Ind. App. 226, 87 N. E. 47 (1909); Watson v. Huntington, 215 Fed. 472 (1914).

[15] Eureka & K. R. R. Co. v. Cal. & N. Ry. Co., 109 Fed. 509 (1901).

[16] Pomeroy's Equity Jurisdiction I, §251½.

[17] Hale v. Allinson, *supra.*

apt to be confused, and if this were so, a bill in equity would be neither more prompt nor more efficient than a number of suits at law. Furthermore the equity court would not be bound by the finding of a jury whose capacity is merely advisory.[18] The result would be a practical deprivation of the right to a jury trial,[19] an objection which should prevent the exercise of jurisdiction when there is a probability that the equitable remedy would not be more adequate than the several actions at law.[20] If on the other hand the question to be determined is the fact of negligence, the deciding of that question by the court is also a deprivation of the right to a jury trial, unless the evidence is such that a court at law would be justified in directing a verdict upon it.[21] Nevertheless, if no negligence were found, the result would be a great increase in efficiency and a marked simplification of issues.

In a recent case decided in the Federal District Court in Alabama,[22] an injunction was granted to prevent the prosecution of some 130 suits at common law, each alleging the negligent operation of the defendant's dam, whereby the plaintiffs' lands were flooded and injured. Whether or not there was sufficient evidence upon which to direct a verdict was not discussed, the court holding that in their opinion the evidence did not support the allegation of negligence. The court refers with approval to Professor Pomeroy's broad rule,[23] and says that equity may exercise jurisdiction "to determine the extent of the rights of the claimants of distinct interests in a common subject." Stress, however, is laid upon the common defense that there was no negligence, and the decision in Hale v. Allinson,[24] based upon the broad ground of the practical prevention of a multiplicity of suits without prejudice to the material interest of anyone, is quoted with approval. This is the first instance of a court's exercising equitable jurisdiction to enjoin tort actions for negligence, where there is a common defense that there is no negligence, although there have been dicta to that effect,[25] and the principle of common defense has been applied in other types of cases.[26] As the first authority on this point, the case is interesting because it points out an easily tenable middle position between two divergent groups of opinion. Since it is plain that the equitable remedy in this case is more adequate than the 130 suits at law, the fundamental purpose for exercising the jurisdiction is realized. The only objection is that of a possible deprivation of the right to a jury trial, which is of small

[18] Raymond v. Flavel, 27 Ore. 219, 40 Pac. 158 (1895).
[19] Vandalia Coal Co. v. Lawson, p. 249, *supra*.
[20] Johnson v. Swanke, 128 Wis. 68, 107 N. W. 481 (1906).
[21] It is interesting to note that under modern English practice there would be no right to a jury trial in negligence cases. Judicature Act of 1873, order XXXVI; rules 2 to 8; The Annual Practice (1919), p. 587.
[22] Montgomery Light and Water Co. v. Charles et al., 258 Fed. 723 (1919).
[23] Pomeroy's Equity Jurisdiction I, §269.
[24] See note 1. *supra*.
[25] Vandalia Coal Co. v. Lawson, p. 256, *supra*.
[26] Virginia-Carolina Chemical Co. v. Home Ins. Co., *supra*.

weight compared with the very great increase in the judicial efficiency which has been accomplished. Without any reference to community of interests, the decision in this case may be properly based upon the broad equitable ground that a more adequate remedy will in fact be supplied, without a serious prejudice to the material interests of any party.[27]

F. H. B. Jr.

THE SCOPE OF THE FOURTH SECTION OF THE STATUTE OF FRAUDS—The second clause of the fourth section of the original Statute of Frauds[1] has given rise to many and various opinions by the judges who have been called upon to interpret it, both in England and in this country, where it has been substantially followed in the statutes of the various jurisdictions.[2]

It sets forth that "no action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person . . . unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith."

It will be observed that the phraseology is indefinite in three particulars: (1) as to the person to whom the promise is made; (2) as to the estate out of which the promisor is to answer for the debt; and (3) as to the person by whom the promise is made.

In regard to the first and second of these particulars, all authorities are agreed in the interpretation. But the third has ever proven a stumbling block. The difficulty is not evidenced so much by the actual decisions of the cases turning on this point. On the contrary, the great majority of courts seem to have had an intuition as to what was the correct result. But the trouble has always come when the judges have attempted to assign the reasons for their decision.

The opinion in the case of Cincinnati Traction Co., v. Cole,[3] recently decided in the U. S. Circuit Court of Appeals for the Sixth District, is a welcome one in this field. For by its clear language and succinct expression, it should prove a great aid in clearing up the confusion which has been occasioned by the opinions rendered hitherto. It does not confine itself to any one of the three indefinite points afore-mentioned; but gives an illuminating discussion and a satisfying determination of what is the correct interpretation of the statute.

It is evident that the statute refers to a conditional promise only—to pay if the debtor does not. "A promise to be primarily liable, or to be liable at all events, whether any person is or shall

[27] Hale v. Allinson, *supra*.

[1] 29 Car. II, c. 3.

[2] In Pennsylvania, Act of April 26, 1855 (P. L. 308).

[3] 258 Fed. 169 (1919).